91-1899

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHRISTOPHER C. DAY, PH.D.,

Petitioner,

– against –

JOHN W. MOSCOW; JOSEPH B. MURRAY, Individually and as Senior Court Officer of the State of New York; "JANE DOE" MARSHALL, Individually and as Captain of the New York City Department of Correction; JOHN DOE, 1-10, Unknown named Officers of the New York City Police Department and the New York City Department of Correction,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether established state rules of accrual are to be applied in civil rights actions brought under 42 U.S.C. Section 1983, pursuant to 42 U.S.C. Section 1988, or whether a "general federal rule of accrual" is to be applied.

2. Whether the claim preclusion can be applied to bar assertion of claims not addressed by the Court of Appeals in a prior decision in the same case, which reversed in part and affirmed in part a judgment of the District Court, or whether the prior decision of the Court of Appeals is the law of the case or collateral estoppel.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

STATUTORY PROVISIONS INVOLVED ... 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT.... 8

ARGUMENT 11

I. SECTION 1988 MANDATES APPLICATION OF STATE RULES OF ACCRUAL IN CIVIL RIGHTS ACTIONS 11

A. THIS COURT'S PRIOR DECISIONS INTERPRET 42 U.S.C. 1988 WOULD REQUIRE APPLICATION OF STATE RULES OF ACCRUAL IN CIVIL RIGHTS ACTIONS 11

B. REFUSAL TO GIVE DEFERENCE TO STATE RULES OF ACCRUAL VIOLATES THE STATE'S CHOSEN POLICY..... 13

C. THERE IS NO GENERAL FEDERAL RULE OF ACCRUAL..... 15

D. THE 'FEDERAL RULE' DOES NOT EXIST 18

II. THE CIRCUIT COURT'S UNPRECEDENTED EXTENSION OF THE DOCTRINE OF CLAIM PRECLUSION TO PRIOR DECISIONS OF A COURT OF APPEALS REVERSING IN PART AND AFFIRMING IN PART VIOLATES ESTABLISHED PRINCIPLES OF FINALITY .23

III. CONCLUSION 30

APPENDIX A-1

A. DECISIONS BELOW A-1

B. STATUTES INVOLVED..... A-69

TABLE OF AUTHORITIES

CASES

Bireline v. Seagondollar, 567 F.2d 260 (4th Cir., 1977) 18, 21

Board of Regents v. Tomanio, 446 U.S. 478, 100 S. Ct. 1890, 64 L. Ed. 2d 440 (1980) 9, 12, 13, 15, 23

Braderman v. Pa. Housing Finance Agency, 620 F. Supp. 1069 (E.D. Pa., 1985) 9

Buford v. Tremayne, 747 F.2d 445 (8th Cir., 1984) 8

Burnett v. Grattan, 468 U.S. 42, 82 L. Ed. 2d 36, 104 S. Ct. 2924 (1984) 13

Catlin v. United States, 324 U.S. 229 (1945) 27

Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 60 L. Ed. 2d 508, 99 S. Ct. 1905 (1979) 16

Chardon v. Fumero Soto, 462 U.S. 658, 77 L. Ed. 2d 74, 103 S. Ct. 2611 (1983) 12, 17

Collins v., Miller, 212 U.S. 365 (1920) 28

Cowgill v. Raymark Industries, Inc., 832 F.2d 798 (3d Cir., 1987) 10, 25

Day v. Morgenthau, 909 F.2d 75 (2d Cir., 1990) 2

Day v. Moscow, 769 F. Supp. 972 (S.D.N.Y., 1991) 2

Day v. Moscow, 955 F.2d 807 (2d Cir., 1992) 2

Erie Railroad Co. v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938) 15

Gaus v. City of Wells, 620 F. Supp. 1461 (N.D. Ind., 1985) 9

Hardin v. Straub, 490 U.S. 536, 109 S. Ct. 1998, 104 L. Ed. 2d 582 (1989) 9, 12

International Union I.U.A. &. A. W. v. Hoosier Cardinal Corp., 383 U.S. 696, 86 S. Ct. 1107, 16 L. Ed. 2d 192 (1966) 19

Johnson v. Railway Express Agency, 421 U.S. 454, 95 S. Ct. 1716, 44 L. Ed. 2d 295 (1975) 8, 11, 12

Kirwan v. State, 320 A.2d 837 (Super. Ct., Conn., 1974) 21

Madruga v. Superior Court of California, 346 U.S. 556, 98 L. Ed. 290, 74 S. Ct. 298 (1958) 17

Milwaukee v. Illinois, 451 U.S. 304, 68 L. Ed. 2d 114, 101 S. Ct. 1784 (1981) 16

Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961) 20

Quinton v. United States, 304 F.2d 234 (5th Cir., 1962) 14, 22

Quitmeyer v. Southeast Pa. Transit Authority, 740 F. Supp. 363 (E.D. Pa., 1990) 10

Rawlings v. Ray, 312 U.S. 96, 61 S. Ct. 473, 85 L. Ed. 605 (1941) 18, 21

Raysor v. Port Authority of New York and New Jersey, 768 F.2d 34 (2d Cir., 1985), cert. den., 475 U.S. 1027, 106 S. Ct. 1227, 89 L. Ed. 2d 337 (2d Cir., 1986) 20

Robertson v. Wegmann, 436 U.S. 584, 98 S. Ct. 1991, 56 S. Ct. 554 (1972) 17, 20

Singleton v. New York, 632 F. 2d 185 (2d Cir., 1980), cert. den., 450 U.S. 920 (1981) 18

Todd v. S.E.C., Inc., 637 F.2d 154 (3d Cir., 1980) 10, 25, 26

United States v. Yazell, 382 U.S. 341, 15 L. Ed. 2d 404, 86 S. Ct. 500 (1966) 17

Urie v. Thompson, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949) 22

Wheeldin v. Wheeler, 373 U.S. 647, 10 L. Ed. 2d 605, 83 S. Ct. 1441 (1963) 16

White v. Bloom, 621 F.2d 276 (8th Cir., 1980), cert. den., 449 U.S. 995 8

Williams v. Dothan, 745 F.2d 1406 (11th Cir., 1984) 9

Wilson v. Garcia, 471 U.S. 261, 105 S. Ct. 1038, 85 L. Ed. 2d 254 (1985) 9, 12, 20

STATUTES

28 U.S.C. Section 1254(1) 2

42 U.S.C. Section 1983 3, 4, 8

42 U.S.C. 1988 9, 11

F.R.C.P. 6

TREATISES

Am. Jur. 2d, False Imprisonment, Section 84 21

49 A.L.R. 2d 922 21

35 C.J.S., False Imprisonment, Section 49 21

54 C.J.S., Limitation of Actions, Section 175 21

Restatement, 2d, Judgments, Section 13 23, 26, 27

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

CHRISTOPHER C. DAY, Ph. D.,

Petitioner

- against -

JOHN W. MOSCOW, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Christopher C. Day, Ph. D. (Day) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on January 24, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals (Day II) is reported at 955 F. 2d 807 (2d Cir., 1992). The opinion of the District Court for the Southern District of New York is reported at 769 F. Supp. 972 (S. D.N.Y., 1991). The prior opinion of the Court of Appeals (Day I) is reported at 909 F. 2d 75 (2d Cir., 1990).

JURISDICTION

The judgment of the Court of Appeals was entered on January 24, 1992. Petitioner timely filed a petition for rehearing with the Court of Appeals. The petition was denied on February 25, 1992. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

42 United States Code, Section 1988 (reproduced in full at Appendix, A-69).

STATEMENT OF THE CASE

This petition arises from the Second Circuit's affirmance of a judgment of dismissal of petitioner's civil rights ac-

tion, brought under 42 U.S.C. 1983, on statute of limitations grounds.

The underlying facts as summarized by the Court of Appeals are as follows:

> At the pertinent times, Day was serving as a paralegal for a New York City law firm. Defendant John W. Moscow was an Assistant District Attorney for New York County; defendant Joseph B. Murray was a senior court officer in the criminal courts building ("courthouse") at 111 Centre Street in New York County.
>
> On December 11, 1985, Day accompanied one of the firm's attorneys to an area of the courthouse known as the "holding pens," in which prisoners were detained. Day waited outside the holding pens while the attorney went inside to deliver a message to a prisoner. On the following day, December 12, 1985, while sitting in a courtroom in the same courthouse, Day was arrested, without a warrant, and charged with criminal trespass in connection with his presence outside the holding pens the day before. Murray arrested Day on the instruction of Moscow, and searched Day's briefcase and

billfold. Day was incarcerated for some 31 hours while awaiting his arraignment. The charge against him was eventually dismissed.

Plaintiff's pro se 1983 false arrest and malicious prosecution complaint was filed December 13, 1988. In an Opinion and Memorandum dated October 23, 1989, the District Court for the Southern District of New York, Duffy, J., dismissed the action against Moscow on grounds of absolute immunity and against Murray on the grounds of failure to state a claim because there was no causal nexus between damages alleged and the arrest/search claims. Plaintiff moved to reargue and for leave to amend, which was denied December 13, 1989.

In Day I, the Court of Appeals reversed the dismissal of the arrest/search and seizure claims against both

respondents, and affirmed the dismissal of the malicious prosecution claims on absolute immunity grounds. The Court also ruled that as three year statute of limitations applied, that under federal law the arrest/search claims accrued at the time of the arrest, but under FRCP 6 did not begin to run until the next day, December 13, 1985. The Court reversed in part, affirmed in part, granted leave to replead, and remanded for further proceedings consistent with the opinion.

Respondent Murray then filed a petition for rehearing and the Court amended its opinion (see Day I at A-21) without permitting petitioner to respond, reversing its ruling that FRCP 6 extended the commencement of the limitations period and affirming the dismissal of the arrest and search and seizure claims against Murray.

On remand, on May 14, 1991, the District Court dismissed the amended complaint on statute of limitations grounds, ruling that the false arrest and search and seizure claims against Moscow were untimely since they accrued on the date of arrest, under the "general federal rule of accrual", and that no "tolling" provision of New York law applied.

The District Court also ruled the malicious prosecution claim against Murray was barred because it was not addressed by the Court of Appeals (although briefed by Petitioner) the remand was limited to granting petitioner leave to replead the false arrest and search and seizure claims.

On appeal, the Second Circuit affirmed.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals, in finding that the date of accrual of Plaintiff's Section 1983 false arrest claim applied a "general federal rule of accrual", ruling that Plaintiff's Section 1983 claim for false arrest accrued at the time of his arrest and not at the time of his release, contrary to New York rules of accrual for false arrest claims.

In doing so, the Court of Appeals decided an important question of federal law in conflict with the holding of the Eighth Circuit Court of Appeals in White v. Bloom, 621 F. 2d 276, 281 (8th Cir., 1980), cert. den. 449 U.S. 995, and Buford v. Tremayne, 747 F. 2d 445 (8th Cir., 1984) in a way in conflict with the applicable decisions of this Court in Johnson v. Railway Express Agency, 421 U.S.

454, 463, 95 S. Ct. 1716, 44 L. Ed. 2d 295 (1975); Board of Regents v. Tomanio, 446 U.S. 478, 484-85, 100 S. Ct. 1890, 64 L. Ed. 2d 440 (1980); Wilson v. Garcia, 471 U.S. 261, 267, 105 S. Ct. 1038, 85 L. Ed. 2d 254 (1985) and Hardin v. Straub, 490 U.S. 536, 109 S. Ct. 1998, 104 L. Ed. 2d 582 (1989); and the express mandate of 42 U.S.C. 1988.

The application of the "general federal rule of accrual" has also caused considerable confusion among the lower federal courts, which have continued to apply state rules of accrual to Section 1983 actions even in Circuits which have adopted the "general federal rule of accrual." See, e.g., Williams v. Dothan, 745 F. 2d 1406 (11th Cir., 1984); Braderman v. Pa. Housing Finance Agency, 620 F. Supp. 1069 (E.D. Pa., 1985); Gaus v. City of Wells, 620 F. Supp. 1461 (N.D. Ind., 1985);

Quitmeyer v. Southeast Pa. Transit Authority, 740 F. Supp. 363 (E.D. Pa., 1990).

2. In applying the doctrine of claim preclusion to a prior decision of the Court in the same case, reversing in part and affirming in part a judgment of the District Court, the Court of Appeals decided an important issue of federal law in conflict with the holding of the Third Circuit Court in Todd v. S.E.C., Inc., 637 F. 2d 154, 156 (3d Cir., 1980) and Cowgill v. Raymark Industries, Inc., 832 F. 2d 798, 802 (3d Cir., 1987), and in going so far as to apply claim preclusion to a decision not final under traditional standards for appealability (Restatement of the Law, Judgments, Sec. 13, Reporter's Note to Comments (a) and (b)) when as an authoritative commentator has stated "there are few reasons to apply it there" (Wright, Miller, Cooper, Federal Practice

and Procedure (1981 ed.), Jurisdiction and Related Matters, Vol. 18, Sec. 4434), the Court of Appeals so far departed from the accepted course of judicial proceedings as to call for the exercise of this Court's power of supervision.

ARGUMENT

I. SECTION 1988 MANDATES APPLICATION OF STATE RULES OF ACCRUAL IN CIVIL RIGHTS ACTIONS

A. THIS COURT'S PRIOR DECISIONS INTERPRETING 42 U.S.C. 1988 WOULD REQUIRE APPLICATION OF STATE RULES OF ACCRUAL

In Johnson v. Railway Express Agency, supra, this Court, in holding that state statutes of limitations were applicable to civil rights claims stated:

> In virtually all statutes of limitations, the chronological length of the limitations period is interrelated with provisions regarding tolling, revival and questions of application. In borrowing a state period of lim-

> itation for application to a federal cause of action, a federal court is relying on the state's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim.

Id, at 463. See also, Board of Regents v. Tomanio, supra, at 488.

This Court has since applied state tolling rules even where a federal rule existed in another area of federal law (Chardon v. Fumero Soto, 462 U.S. 658, 77 L. Ed. 2d 74. 103 S. Ct. 2611 (1983)) and reversed a ruling of the Sixth Circuit Court of Appeals holding a state tolling rule claimed during imprisonment not inconsistent with federal policy (Hardin v. Straub, 490 U.S. 536, 109 S. Ct. 1998, 104 L. Ed. 2d 582 (1989)).

In this Court's decision in Wilson v. Garcia, supra, the Court affirmed that not only were the length of the limitations

period, but also "closely related questions of tolling and application" to be governed by state law.

It would be unreasonable and illogical to apply state tolling rules, but not apply state rules of accrual for closely analogous claims. The purpose of relying on a state's rules of limitation and tolling is to give force to the state's policies in adopting the rule. See, Board of Regents v. Tomanio, supra, at 487; Burnett v. Grattan, 468 U.S. 42, 82 L. Ed. 2d 36, 104 S. Ct. 2924 (1984) (Rehnquist, J., concurring), at 60.

B. REFUSAL TO GIVE DEFERENCE TO TO STATE RULES OF ACCRUAL VIOLATES A STATE'S CHOSEN POLICY

Although giving full force to state "tolling" rules, the lower court's decision here arrived at a result at odds with state "policy." Then-Chief Judge Tuttle

of the Fifth Circuit Court of Appeals, in Quinton v. United States, 304 F. 2d 234 (5th Cir., 1962), rejected a hard and fast distinction between "accrual" and "tolling" rules for this very reason. Id, at 238.

Concluding that "either the entire state scheme of limitations must be applied (..) or the scheme must be ignored completely." Id., at 238, Judge Tuttle, faced with a federal statute of limitations, concluded that state law must be disregarded completely.

Here, where this Court has affirmed that Section 1988 requires application of state statutes of limitations, the same reasoning compels, not adoption of a part of the state scheme -- the limitations period and "coordinate tolling rules" -- but the entirety of a "complete limita-

tions policy." Board of Regents v. Tomanio, supra, at 488.

C. THERE IS NO GENERAL FEDERAL RULE OF ACCRUAL

The lower court's reliance on "federal law" to establish a different time of accrual for 1983 claims than for analogous state law claims is erroneous. Under Section 1988 a court should apply federal common law, as part of the laws and statutes of the United States, if "adapted to the object" of the civil rights laws. The court should not, however, create it out of thin air when there exists substantial state law, based in common law tradition.

There is, of course, no general federal common law. Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78, 82 L.Ed. 1188, 58 S. Ct. 817 (1938). The instances where courts recognized "in some limited areas"

the need to formulate "federal common law" are "few and restricted." Milwaukee v. Illinois, 451 U.S. 304, 312, 68 L. Ed. 2d 114, 101 S. Ct. 1784 (1981), quoting Wheeldin v, Wheeler, 373 U.S. 647, 651, 10 L. Ed. 2d 605, 83 S. Ct. 1441 (1963).

Section 1983, as this Court has affirmatively stated, is a federal statute, but it is only provides a remedy and does not itself create any substantive rights. Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 617-618, 60 L. Ed. 2d 508, 99 S. Ct. 1905 (1979).

Nor do the civil rights acts provide an instance where the uniquely federal interests require protection or where conflicting rights of the states are involved.

Typically, federal common law is developed with respect to federal programs

and actions which by their nature must be uniform throughout the nation. United States v. Yazell, 382 U.S. 341, 15 L. Ed. 2d 404, 86 S. Ct. 500 (1966). Absence of such a need is a ground for not fashioning federal common law. Madruga v. Superior Court of California, 346 U.S. 556, 98 L. Ed. 290, 74 S. Ct. 298 (1958). However, Section 1988 itself precludes such a need. See, Robertson v. Wegmann, 436 U.S. 584, 98 S. Ct. 1991, 56 S. Ct. 554 (1972).

This Court has refused to import federal common law developed in another area of federal law to areas in which Section 1988 applies. See, Chardon v. Fumero Soto, supra. If the purported source of this federal law of accrual is not "adapted to the object of the civil rights laws" there is no reason to apply it here.

D. THE FEDERAL RULE DOES NOT EXIST

Singleton v. New York, 632 F. 2d 185 (2d Cir., 1980), cert. den., 450 U.S. 920 (1981), cited as source by the District Court (A-40) and relied upon by the Respondents, seeks a source for a general federal common law rule of accrual in two cases, one decided by this Court -- Rawlings v. Ray, 312 U.S. 96, 61 S. Ct. 473, 85 L. Ed. 605 (1941) -- and one decided by the Fourth Circuit Court of Appeals -- Bireline v. Seagondollar, 567 F. 2d 260 (4th Cir., 1977).

The Second Circuit in Singleton relies upon Rawlings for the proposition that "the time of accrual is a federal question", and a matter of "federal law". However, the this does not require creation of federal law or even application of federal law created in another area of

law. There is no reason to reject the rule that state law would impose unless that rule is unreasonable or otherwise inconsistent with national policy. International Union I.U.A. &. A. W. v. Hoosier Cardinal Corp., 383 U.S. 696, 706, 86 S. Ct. 1107, 16 L. Ed. 2d 292 (1966).

The question addressed there was whether a state rule of accrual should apply to a federal statute which, unlike 1983, did create substantive rights. Interpreting the Arkansas limitations statute the Court ruled that the accrual

> turn[ed] upon the construction of the assessment and the authority of the Comptroller to make it under the applicable federal legislation.

Id, at 98.

The Court in Rawlings did not turn to some ephemeral "general rule of accrual" but to the federal statute which created

the liability.

In Rawlings, the Court turned to the statute to determine when the cause of action was complete because it provided the content of the remedial rule itself. However, it is clearly established by this Court that state law provides the content. Cf, Robertson v. Wegmann, supra.

As this Court noted in Wilson v. Garcia, supra, at 277, state tort law has been turned to establish the element of causes of action under 1983 and to identify immunities. If the elements of the cause of action are given by state tort law of false arrest (Cf. Monroe v. Pape, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961); Raysor v. Port Authority of New York and New Jersey, 768 F. 2d 34, 40 (2d Cir., 1985), cert. den., 475 U.S. 1027, 106 S. Ct. 1227, 89 L. Ed. 2d 337

(2d Cir., 1986)), what reason is there for refusing to follow state law in determining when the cause of action is "complete"?

Under the common law tort of false arrest that the cause of action "accrues" at the time of arrest, but is "not complete" until the detention terminates. At common law there was no right of action until the detention had terminated. See, 32 Am. Jur. 2d, False Imprisonment, Section 84; 54 C.J.S., Limitation of Actions, Section 175, p. 145; note, 49 A.L.R. 2d 922; 35 C.J.S., False Imprisonment, Section 49, p. 714. See also, Kirwan v. State, 320 A. 2d 837, 840 (Super. Ct., Conn., 1974).

Reliance upon Bireline v. Seagondollar is equally erroneous. In Bireline, supra, the Fourth Circuit, relying on Raw-

lings, supra, turned to federal court decisions in other areas for a "rule of accrual," and concluded, relying on this Court's decision in Urie v. Thompson, 337 U.S. 163, 170, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949) that the "general federal" rule was that any cause of action accrued when the plaintiff knew or should have known of the injury.

Urie v. Thompson is particularly inappropriate where Section 1988 is applicable for the very reasons stated in Quinton v. United States, supra. In Urie v. Thompson, this Court construed a single federal statute of limitations as in Quinton. See, e.g., the discussion of Urie in Quinton, supra, at 239.

Nor does Urie purport to establish a general federal rule of accrual, but simply to construe the meaning of "accrue"

for causes of action accruing under the Federal Employers' Liability Act. Indeed, the chief purpose of the rule of Urie -- uniformity has been rejected in civil rights claims by the language of 1988 itself. See, Board of Regents v. Tomanio, supra, at 489.

II. THE CIRCUIT COURT'S UNPRECEDENTED EXTENSION OF THE DOCTRINE OF CLAIM PRECLUSION TO PRIOR DECISION OF A COURT OF APPEALS REVERSING IN PART AND AFFIRMING IN PART VIOLATES ESTABLISHED PRINCIPLES OF FINALITY

It is well established that the rule of res judicata applies only to a final decision. Restatement, Judgments, Section 13. Here, however, the court below extended the doctrine to a decision that would have been considered under prevailing law, subject merely to the law of the case or, at best, collateral estoppel (issue pre-

clusion).

The Circuit Court held that Day's malicious prosecution claim against Murray, which was raised in Day's proposed amended complaint and in his Brief in Day I but not ruled on in the Circuit Court's decision in Day I could not be asserted on remand by res judicata (claim preclusion), because the decision in Day I, reversing a judgment of dismissal in part and affirming it in part (the malicious prosecution claim against Moscow, and on rehearing the false arrest and search and seizure claims against Murray) and remanding for further proceedings barred not only the claims addressed in Day I "but any other claim that Day could have asserted (against Murray) arising out of the same events" (Day II, Appendix at A-59).

The Third Circuit has held that when

an appellate court affirms in part and reverses in part, all issues necessarily disposed of in the affirmance become the law of the case when the case is remanded for proceedings on other issues. Cowgill v. Reynolds Industries, Inc., 832 F. 2d 798, 802 (3d Cir., 1987), citing Todd & Co. v. S.E.C., 637 F. 2d 154, 156-57 (3d Cir., 1980). Issues which are not necessarily disposed of are not subject to either the law of the case or collateral estoppel (issue preclusion).

As the Third Circuit stated in Todd, supra

> a subsequent appellate panel must determine whether the arguments presented to it were not considered or left open by the prior panel; if the arguments were not considered, it must determine whether they were fairly presented and thus preserved for later consideration.

Id, at 156-57. Here, the Second Circuit applied a different rule to a decision

affirming in part and reversing in part, inconsistent with the Third Circuit's rulings in Todd and Cowgill and with established law of res judicata.

The rules of res judicata are applicable only to a final decision. Restatement of the Law, 2d, Judgments, Sec. 13. A decision of a Court of Appeals affirming in part and reversing in part and remanding for further proceedings, even on other issues, is not 'final' in this sense. Noting that some confusion has been caused because of the liberties taken with the concept of finality in the context of appeal, the Restatement affirms: "A general working description of finality in the field of former adjudication will (...) resemble the (...) traditional, strict formulation of the concept for appellate review." Id, Sec. 13, Comment (b), p. 132.

The Reporter's Note to Comments (a) and (b) of Section 13 clarifies that the general formulation of finality for purposes of res judicata set forth in Comments (a) and (b) is the traditional definition of finality in regard to appellate review which appears in such cases as Catlin v. United States, 324 U.S. 229, 233 (1945), that it "ends the litigation ... and leaves nothing for the court to do but to execute the judgment." Id, p. 138. This requirement, the Restatement tells us, is to be "interpreted strictly", "as indicated in Comment (a)," when bar (applied here by the Circuit Court) or merger is at stake, since the effect is to "extinguish" a claim. Id, Comment (g), p. 135-36.

The "strictness" of the definition of finality for purposes of claim preclusion, as distinct from issue preclusion, has not

only been emphasized by the Restatement but by commentators, as well. Wright, Miller, Cooper, Federal Practice and Procedure (1981 ed.), Jurisdiction and Related Matters, Vol. 18, Sec. 4434).

Nor is there any basis in the traditional doctrine of appellate finality, relied upon by the Restatement, for giving a partial reversal -- remanding the case for further proceedings even if on other issues -- finality.

The Circuit Court, apparently considered their decision in Day I on rehearing "final as to Murray" because it affirmed the dismissal of other claims against him. However, as this Court has emphasized

> the rule requires that the judgment, to be appealable, should be final not only as to all the parties, but as to the whole subject matter and as to all the causes of action involved.

Collins v., Miller, 212 U.S. 365, 370-71

(1920).

Had the Circuit Court applied the law of the case or issue preclusion to its decision in Day I, the malicious prosecution claim against Murray would have been allowed. The Circuit Court clearly did not believe it had ruled on the claim explicitly or implicitly in Day I by its very treatment of the claim as one which "might have been litigated".

For the court below, by so few words, to have extended the doctrine of claim preclusion where no court has ventured to, and where "there are few reasons to extend it" (Wright, Miller, Cooper, Op. Cit.) in conflict with the holdings of another Court of Appeals, refusing to apply it, calls for this Court's power of supervision.

CONCLUSION

WHEREFORE, Petitioner respectfully requests that this Court grant certiorari to review the judgment of the Court of Appeals for the Second Circuit, entered herein January 24, 1992.

Dated: May 26, 1992
Brooklyn, New York

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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

CHRISTOPHER C. DAY, 88 Civ. 8788 (KTD)

Plaintiff,

MEMORANDUM & ORDER

-against-

ROBERT B. MORGENTHAU, in his official capacity a District Attorney for the County of New York; JOHN W. MOSCOW, individually and in his official capacity as Assistant District Attorney for the County of New York, et al.

Defendants.
----------x

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KEVIN THOMAS DUFFY, D.J.:

Plaintiff, Christopher Day, proceeding pro se brings this Section 1983 action for monetary and declaratory relief against Robert Morgenthau, the District Attorney for the County of New York; John Moscow, an Assistant District Attorney for the County of New York; Hon. Edward McLaughlin, a Judge of the New York City Criminal Court; Joseph Murray, a Senior Court Officer; "Jane Doe" Marshall, an employee of the Department of Corrections ("DOC"); and Richard Koehler, the Commissioner of the New York City

Department of Corrections.[1] Day is a retired anthropology professor, who, at least in 1986-87, worked for a law firm as a paralegal. Day is suing all of the above named defendants in their official capacities and some of them individually for various civil rights and constitutional violations. All of the named defendants move, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss the complaint.

FACTS

[1] The Attorney General's office requested that the motion to dismiss brought by Defendant McLaughlin and Murray be converted to a motion for summary judgment because the plaintiff submitted papers outside the pleadgins. This is not necessary, however, because plaintiff's response to the defendant's 12(b)(6) motion will not be considered by the court on this motion. Even in the event it was considered, nothing of substance is added to the complaint thereby.

Day claims that he was present and authorized to wait outside some holding pens at one of the state court buildings for a reason which remains undisclosed in his complaint, and that thereafter, he was arrested, searched and charged with criminal trespass in the third degree. Complaint paragraphs 10-13. Day further alleges that in addition to illegally seizing documents, court personnel detained him for 31 hours prior to being arraigned. Complaint paragraph 14. Day also contends that his sixth amendment right to counsel was violated as a result of the order of Hon. Edward McLaughlin, New York Supreme Court, which "refused without authority or justification to permit Plaintiff's retained counsel access to him." Complaint paragraph 16. But see People v. Day, 499 N.Y.S. 2d 1003 (Sup. Ct. N.Y. Co. 1986). Additionally, Day alleges a policy of discriminatory actions

on the part of court personnel and the District Attorney's office. Finally, Day alleges that false rumors about him regarding the commission of uncharged crimes were spread at the direction of defendant Moscow, causing Day to be segregated from the rest of the prison population, in violation of his first amendment rights to freely associate. Complaint paragraph 17.

DISCUSSION

Affording Day the broadest reading of his pleadings and assuming the allegations as set forth in the complaint are true, Day fails to state a claim upon which relief may be granted.

A. The Prosecutor

The allegations against defendants Morgenthau and Moscow involve actions within their jurisdiction as prosecutors.

"A prosecutor enjoys absolute immunity from Section 1983 suits for damages when he acts within the scope of his prosecutorial duties." Imbler v. Pachtman, 424 U.S. 409, 420 (1976). Absolute immunity adheres even in cases of malicious prosecution and false arrest, on the basis that the community is better served by prosecutors who are unhindered in exercising their best judgment for fear of recrimination and harassment. Id. at 427-29. Additionally, violation of the right to prompt arraignment does not warrant dismissal of the underlying criminal action where there has been no exploitation of process or prejudice to rights of the defendant. Garstein v. Pugh, 420 U.S. 103 (1975). Although Day alludes to hardship and harassment experienced during his detainment, he himself never specifies in what way he suffered undue hardship and prejudice.

Therefore, the actions taken by Morgenthau and Moscow that resulted in Day's arrest and detainment are protected under Imbler, and the complaint must be dismissed as to them.

B. The Judge

Likewise, the actions of Hon. Edward McLaughlin about which Day complains are absolutely protected by judicial immunity. "The immunity of a judge for acts within his jurisdiction has roots extending to the earliest days of the common law." Imbler, at 423, n.20. Furthermore, Judge McLaughlin denial of Day's counsel of choice was grounded on a basic conflict of interest. Day's chosen counsel, a member of the law firm where Day was a paralegal, was herself a defendant in a criminal proceeding for which Day's testimony was being subpoenaed. In addition, the merits of Day's claims against Judge McLaughlin

were fully and fairly litigated in state court and Day is collaterally estopped from asserting them anew here. See People v. Day, 499 N.Y.S.2d 1003 (Sup. Ct. N.Y. Co. 1986). Day's allegations thus fail to state a claim upon which relief may be granted against Judge McLaughlin.

C. The Other Defendants

Finally Day's allegations against Murray, a senior court officer who allegedly undertook an illegal search of Day's briefcase, do not make out a case for either damages or declaratory relief. Day himself admits that the evidence seized was suppressed and never used against him. Complaint paragraph 21. Indeed, the only damages claimed by Day deal with attorney's fees and mental anguish occasioned by the four-month defense of the charges brought against him. It cannot be said that this damage

has any logical nexus with the search conducted by Murray after Day's arrest.

Similarly, the allegations against "Jane Doe" Marshall, the DOC officer who supposedly held Day in segregation during his time in jail, do not rise to the level of a constitutional tort or deprivation. Thus, the complaint must be dismissed as to her.

The inclusion of the defendant Koehler or Commissioner of Corrections seems at best posited on the theory of respondeat superior for the actions of "Jane Doe" Marshall. However, because her actions do not amount to a constitutional tort, no liability could thus accrue against Koehler. In addition, respondeat superior standing alone is insufficient to maintain an action such as this against a municipal department chief. See Kentucky

v. Graham, 473 U.S. 159, 168 (1985); Accord, Monell et al. v. Department of Social Services of the City of New York, 436 U.S. 658 (1978).

In conclusion, Day can prove no facts sufficient to entitle him to relief. The motion to dismiss is therefore granted and the complaint is dismissed.

SO ORDERED.

DATED: New York, New York
October 23, 1989

KEVIN THOMAS DUFFY, U.S.D.J.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1237—August Term, 1989

(Argued May 31, 1990 Decided July 19, 1990)

Docket No. 90-7040

CHRISTOPHER C. DAY, Ph.D.,

Plaintiff-Appellant,

—against—

ROBERT M. MORGENTHAU, in his official capacity as District Attorney for the County of New York, JOHN W. MOSCOW, Individually and in his official capacity as Assistant District Attorney for the County of New York, Hon. EDWARD MCLAUGHLIN, Individually and in his official capacity as Judge of the Criminal Court of the City of New York, JOSEPH B. MURRAY, Individually and in his official capacity as Senior Court Officer, "JANE DOE" MARSHALL, individually and in her official capacity as an officer of the New York City Department of Correction, RICHARD KOEHLER, in his official capacity as Commissioner of the New York City Department of Correction,

Defendants-Appellees.

Before:

KAUFMAN, KEARSE and MINER,
Circuit Judges.

Appeal from judgment and order of United States District Court for the Southern District of New York (Duffy, *J.*) dismissing civil rights complaint for failure to state a claim and denying leave to file amended complaint.

Affirmed in part, reversed in part and remanded.

BERNARD FROMARTZ, Brooklyn, NY, *for Plaintiff-Appellant.*

HOWARD L. PERZAN, Assistant District Attorney, New York, NY (Robert M. Morgenthau, District Attorney, Marc Frazier Scholl, Assistant District Attorney, New York, NY, of counsel), *for Defendants-Appellees Morgenthau and Moscow.*

STEPHEN MENDELSOHN, Assistant Attorney General, New York, NY (Robert Abrams, Attorney General of the State of New York, Lawrence S. Kahn, Deputy Solicitor General, New York, NY, of counsel), *for Defendant-Appellee Murray.*

HELENA LEE, New York, NY (Victor A. Kovner, Corporation Counsel, Stephen J. McGrath, New York, NY, of counsel), *for Defendants-Appellees Marshall and Koehler.*

MINER, *Circuit Judge*:

Plaintiff-appellant Christopher C. Day appeals from a judgment of the United States District Court for the Southern District of New York (Duffy, *J.*) dated October 30, 1989, dismissing his complaint for failure to state a claim upon which relief may be granted, *see* Fed. R. Civ. P. 12(b)(6), and from a December 13 order of that court denying leave to file an amended complaint, *see* Fed. R. Civ. P. 15(a). Day alleged in his initial complaint that defendants-appellees, acting under color of state law, deprived him of his constitutional rights in violation of 42 U.S.C. § 1983 (1982) when they arrested, searched, detained and prosecuted him on a charge of criminal trespass.

On appeal, Day contends that the district court erred in dismissing the claims against defendants-appellees John W. Moscow and Joseph B. Murray. He also contends that the district court abused its discretion in denying his post-judgment motion for leave to file an amended complaint amplifying his claims against Moscow and Murray. Day does not address the claims pleaded against the other defendants, and we therefore have no reason to do so. *See Kletschka v. Driver*, 411 F.2d 436, 446-47 (2d Cir. 1969); Fed. R. App. P. 28(a)(4).

For the reasons that follow, we affirm the dismissal of the claim of malicious prosecution against Moscow, reverse the dismissal of the claims of false arrest and illegal search and seizure against Moscow and Murray, and remand the case for further proceedings consistent with this opinion.

BACKGROUND

Day made the following allegations in his complaint, which we accept as true for purposes of reviewing this motion to dismiss. On December 11, 1985, Day and an attorney for whom he worked as a paralegal went to the ninth floor of the criminal courts building at 111 Centre Street in Manhattan. After receiving verbal authority from a Correction Officer, Day waited outside the prisoner "holding pens" while the attorney went inside to consult with a client. The following day, defendant-appellee John W. Moscow, an Assistant District Attorney for New York County, observed Day in a courtroom gallery and "directed" defendant-appellee Joseph B. Murray, a Senior Court Officer, to arrest him. Murray arrested Day without a warrant on a charge of criminal trespass in the third degree, alleging that Day's presence outside the "holding pens" the day before was unauthorized. At the time of arrest, Murray searched and seized the contents of Day's briefcase. Although initially informed that he would be released on an "appearance ticket," Day was incarcerated for thirty-one hours prior to his arraignment on the criminal trespass charge because of Moscow's intervention.

On April 13, 1986, Day's motion to suppress the contents of his briefcase was granted by a judge of the New York City Criminal Court. Following three adjourn-

ments of trial at the prosecution's request and the expiration of the time for a speedy trial, the Criminal Court dismissed the charge on the prosecution's motion. Day then commenced this action under section 1983 for false arrest, illegal search and seizure, and malicious prosecution.

The district court dismissed all claims against Moscow on the ground that his actions were within the scope of his prosecutorial duties and therefore protected by absolute immunity. The court also dismissed the claim against Murray for illegal search and seizure, because the only damages alleged—attorney's fees and mental anguish caused by the four-month prosecution of the charge against Day—had no causal nexus with the search. The order dismissing the complaint was entered on October 24, 1989, and final judgment was entered on October 31.

On November 13, Day moved in the district court for reconsideration and leave to file an amended complaint pursuant to Federal Rules of Civil Procedure 15(a), 59(a) and 60(b). In the proposed amended complaint, Day alleged that Moscow "ordered" Murray to detain and arrest him without a warrant or probable cause and to have him incarcerated on a misdemeanor complaint. He also alleged that Moscow "conspired with and instructed" Murray in both the search of Day's briefcase and the prosecution of the charge against him. Finally, he alleged that Moscow instructed Murray not to allow Day's release on an "appearance ticket." The district court denied the motion for leave to file an amended complaint on December 13. Day filed a timely notice of appeal from the judgment and order on January 2, 1990. *See* Fed. R. App. P. 4(a)(4).

DISCUSSION

Section 1983 provides a civil claim for damages and injunctive relief against any person who acts under color of state law to deprive another of a constitutional right. 42 U.S.C. § 1983. Allegations of facts constituting an arrest without probable cause, an unreasonable search and seizure, or malicious prosecution state claims under section 1983. *See, e.g., Monroe v. Pape*, 365 U.S. 167, 171 (1961). When subjected to an illegal search and seizure, special damages need not be alleged because "the victim is harmed by the invasion of his zone of privacy, whether or not the evidence unlawfully obtained is introduced at trial." *Lee v. Willins*, 617 F.2d 320, 322 (2d Cir.), *cert. denied*, 449 U.S. 861 (1980). The allegations that Day was arrested, searched and prosecuted without probable cause therefore set forth the essential elements of a section 1983 claim.

Although section 1983 imposes liability upon "every person" who deprives another of a constitutional right under color of state law, the doctrines of absolute and qualified immunity shield prosecutors and law enforcement officers from liability related to their official acts. *Imbler v. Pachtman*, 424 U.S. 409, 417-19 (1976). Assistant District Attorney Moscow is absolutely immune from liability under section 1983 for acts "within the scope of his duties in initiating and pursuing a criminal prosecution." *Id.* at 410. "The granting or denial of absolute immunity depends more, however, on the function being performed than on the office of the defendant, and the absolute immunity accorded a prosecuting attorney is extended only so far as is necessary to the effective functioning of the judicial process." *Robison v. Via*, 821 F.2d 913, 918 (2d Cir. 1987); *see also Taylor*

v. Kavanagh, 640 F.2d 450, 452 (2d Cir. 1981). The test is whether the prosecutor is engaged in activities that are "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430; *see, e.g., Barr v. Abrams*, 810 F.2d 358, 362 (2d Cir. 1987) (filing criminal information and obtaining arrest warrant); *Taylor*, 640 F.2d at 453 (plea bargaining); *Lee*, 617 F.2d at 322 (alleged falsification of evidence and coercion of perjured testimony). When a prosecutor is engaged in administrative or investigative activities, he is entitled only to qualified immunity, which requires a showing that his acts were objectively reasonable. *See, e.g., Robison*, 821 F.2d at 920 (seizure of allegedly abused child).

While there are no "bright lines between quasi-judicial absolutely immune conduct, on the one hand, and investigative and administrative qualifiedly immune behavior, on the other," *Powers v. Coe*, 728 F.2d 97, 104 (2d Cir. 1984), the allegation that Moscow engaged in malicious prosecution of the charge against Day is clearly within the "judicial phase of the criminal process," *Imbler*, 424 U.S. at 430, and we therefore affirm the dismissal of that claim on absolute immunity grounds.

Arrests and searches, however, "are normally police functions, and they do not become prosecutorial functions merely because a prosecutor has chosen to participate." *Robison*, 821 F.2d at 918; *see also Barr*, 810 F.2d at 362 (recognizing a "meaningful" distinction "between filing the criminal information and procuring an arrest warrant, on the one hand, and executing the arrest warrant, on the other"). The original complaint alleges that Moscow "directed" Murray to arrest Day

without a warrant and without probable cause, while all three men were in the same courtroom. Since this allegation suggests that Moscow may have participated in "executing the arrest," it cannot be found "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Defendants-appellees assert that the claims of false arrest and illegal search and seizure nevertheless are barred by the doctrine of qualified immunity. Qualified immunity will preclude a trial on Day's claims if, based on the facts known to Moscow, it was objectively reasonable for Moscow to believe that probable cause existed for the arrest. *See Krause v. Bennett*, 887 F.2d 362, 368 (2d Cir. 1989). Murray also may be entitled to qualified immunity if it was objectively reasonable for him to rely on the information he received from Moscow. *See Calamia v. City of New York*, 879 F.2d 1025, 1033 (2d Cir. 1989); *see also United States v. Ventresca*, 380 U.S. 102, 110 (1965). The qualified immunity issue cannot be resolved on the face of the present complaint, however, because the complaint does not identify what facts were known to Moscow and Murray at the time of the arrest and search.

Murray also contends that the district court's dismissal of the complaint may be affirmed on the ground that Day's claims are time barred. Day's section 1983 claims are governed by the three-year statute of limitations prescribed by New York law. *See Owens v. Okure*, 488 U.S. 235 (1989). Murray asserts that since the arrest and search occurred on December 12, 1985, and the action was commenced on December 13, 1988, the complaint was filed one day late. However, "only the length

of the limitation period is governed by state law." *Okure v. Owens*, 816 F.2d 45, 47 (2d Cir. 1987) (citing *Wilson v. Garcia*, 471 U.S. 261, 269 (1985)), *aff'd*, 488 U.S. 235 (1989). Under federal law, "[i]n computing any period of time prescribed or allowed by . . . any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included." Fed. R. Civ. P. 6(a). The result is the same under New York law. *See* N.Y. Gen. Constr. Law § 20 (McKinney Supp. 1990). Thus, the three-year period prescribed by the applicable New York statute did not begin to run until the day after the arrest and search. Day's claims therefore are timely.

Finally, we turn briefly to the district court's order denying Day's motion to amend his complaint. Under Federal Rule of Civil Procedure 15(a), "leave [to amend] shall be freely given when justice so requires." *See Foman v. Davis*, 371 U.S. 178, 182 (1962); *Ronzani v. Sanofi S.A.*, 899 F.2d 195, 198 (2d Cir. 1990). While the district court is vested with discretion to deny leave to amend, "outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion." *Ronzani*, 899 F.2d at 198 (quoting *Foman*, 371 U.S. at 182). Since it is apparent that Day cannot allege any facts to state a claim for malicious prosecution, allowing leave to amend the complaint as to that claim would serve no purpose. *See id.* However, Day has stated claims for false arrest and illegal search and seizure against Moscow and Murray. Accordingly, we direct the district court on remand to permit Day to file an amended complaint amplifying those claims.

CONCLUSION

The judgment of the district court is affirmed insofar as it dismissed the claim for malicious prosecution. The portion of the judgment dismissing the claims for false arrest and illegal search and seizure against Moscow and Murray is reversed, and the case is remanded for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1237 - August Term, 1989

On Petition for Rehearing
Decided August 29, 1990

Docket No. 90-7040

CHRISTOPHER C. DAY, Ph.D.,

Plaintiff-Appellant

-against-

ROBERT M. MORGENTHAU, in his official capacity as District Attorney for the County of New York, JOHN W. MOSCOW, Individually and in his official capacity as Assistant District Attorney for the County of New York, Hon. EDWARD McLAUGHLIN, Individually and in his official capacity as Judge of the Criminal Court of the City of New York, JOSEPH B. MURRAY, Individually and in his official capacity as Senior Court Officer, "JANE DOE" MARSHALL, individually and in her official capacity as an officer of the New York City Department of Correction, RICHARD KOEHLER, in his official capacity as Commissioner of the New York City Department of Correction.

Defendant-Appellees

Before: KAUFMAN, KEARSE and MINER,

Circuit Judges.

Petition for rehearing of appeal following decision filed July 19, 1990.

Petition granted and opinion amended.

MINER, Circuit Judge:

Defendant-appellee Joseph B. Murray petitions for rehearing of this appeal following our decision filed on July 19, 1990. The petition is granted and we now affirm the dismissal of the complaint against Murray on the ground that the claims pleaded therein are time barred. It follows that leave to replead the claims asserted against Murray also must be denied. We deem our prior opinion amended accordingly.

Murray allegedly conducted an unlawful arrest and search of plaintiff-appellant Christopher C. Day on December 12, 1985. December 12 was the day of accrual of Day's claims, contrary to his

contention that his claims accrued on December 13, 1985, the day of his arraignment. We determined that Day's claims, pleaded under 42 U.S.C. Section 1983 (1982), were subject to a three-year statute of limitations, see Owens v. Okure, 488 U.S. 235 (1989); N.Y. Civ. Prac. L. & R. 214(5) (McKinney 1990), and that the first day of that three-year period was December 13, 1985, the day following the date the claims accrued, see Fed. R. Civ. P. 6(a). This much of our prior opinion rested on well-settled law, but our determination that the three-year period ended on December 13, 1988 involved a more muddled area of the law, compare Bledsoe v. Department of Housing and Urban Development, 398 F. Supp. 315, 318-21 (E.D. Pa. 1975) and Rodriquez v. United States, 382 F. Supp. 1, 2 (D.P.R. 1974) with Morton v. City of Little Rock, 728 F. Supp. 543, 546 (E.D. Ark. 1989) and Murray

v. United States Postal Serv., 569 F. Supp. 794, 796 (N.D.N.Y. 1983), and the one that never has been addressed directly by this court, cf. United States v. Guerro, 694 F.2d 898, 903 (2d Cir. 1982) (day of offense is excluded when calculating statute of limitations for violation of 18 U.S.C. Section 371), cert. denied, 459 U.S. 1222 (1983).

Federal Rule of Civil Procedure 6(a) provides that "the day of the act ... from which the designated period of time begins to run shall not be included" in calculating the statute of limitations. On rehearing, we are persuaded that this rule should have the same result as New York General Construction Law Section 20, which also provides that the first day to be counted in this reckoning is the day after the date of accrual. The New York provision has been interpreted to mean that "[w]hen the applicable limitations

period is measured in years, ... the anniversary date [of the date of accrual is] the last day for instituting an action." Evans v. Hawker-Siddeley Aviation, Ltd., 482 F. Supp. 547, 550 (S.D.N.Y. 1979); see also D. Siegel, New York Practice Section 34 (1978).

Day's complaint was not filed until December 13, 1988, one day after the third anniversary date of the date of accrual, and is therefore time barred.

CONCLUSION

The petition is granted and the opinion is amended to affirm the district court's judgment dismissing the complaint against defendant-appellee Murray and the order denying leave to amend the complaint against him. The opinion otherwise is unchanged.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

CHRISTOPHER C. DAY, Ph.D.,
88 Civ. 8788 (KTD)

Plaintiff,

MEMORANDUM & ORDER

-against-

JOHN W. MOSCOW; JOSEPH B. MURRAY, individually and as Senior Court Officer of the State of New York; "JANE DOE" MARSHALL, individually and as Captain of the New York City Department of Correction; JOHN DOES 1-10, unknown named officers of the New York City Police Department and the New York City Department of Correction.

Defendants.
----------x

APPEARANCES:

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HON. ROBERT ABRAMS
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Assistant Attorney General

HON. ROBERT M. MORGENTHAU
District Attorney, New York County
Attorney for Defendant John W. Moscow
One Hogan Place
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Of Counsel: Thomas B. Litsky, Esq.
Marc Frazier Scholl, Esq.
Assistant District Attorneys

KEVIN THOMAS DUFFY, D.J.;

Plaintiff, Christopher C. Day, Ph.D., proceeding pro se, commenced this action pursuant to 42 U.S.C. Section 1983, seeking a declaratory judgment and money damages against defendants Robert M. Morgenthau, District Attorney for New York County, John W. Moscow, Assistant District Attorney, Joseph B. Murray, a court officer who purportedly arrested Day, and other individuals.

On March 29, 1989, Moscow moved pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the complaint, which I granted on October 23, 1989, dismissing all claims against Moscow, on prosecutorial immunity grounds. In addition, the complaint was dismissed against all remaining defendants for various reasons. A final judgment was entered on October 24, 1989. On November 13, 1989, Day moved for reconsideration and leave to file an amended complaint. This request was denied on December 13, 1989. Day thereafter appealed the decision a against defendants Moscow and Joseph B. Murray, a court officer who purportedly arrested Day.

On August 29, 1990, the Second Circuit affirmed the dismissal of the complaint, concluding that the malicious prosecution claim against Moscow was barred by principles of prosecutorial

immunity. With regard to Day's false arrest and illegal search and seizure claims, the Court held that Day should be permitted an opportunity to file an amended complaint. The panel rejected Murray's argument that false arrest and illegal search and seizure were barred by the statute of limitations. See Day v. Morgenthau, 909 F.2d 75, 77-78 (2d Cir., 1990).

Murray petitioned the Second Circuit for rehearing of the appeal, which was granted on August 29, 1990. After reconsidering Murray's application, the Second Circuit reversed its prior decision and affirmed my dismissal of the complaint against Murray, stating that unlawful arrest and search claims as to Murray were barred because the complaint was untimely. Day v. Morgenthau, 909 F.2d at 78. On November 19, 1990, Day filed an amended

complaint against Moscow, Murray and other individuals pursuant to 42 U.S.C. Sections 1983 and 1985(2), seeking equitable relief as well as compensatory and punitive damages. It alleges numerous claims including conspiracy to: (1) prevent Day from testifying in court; (2) injure him for attempting to enforce a Black person's right to equal protection of the laws; (3) chill Day's first amendment rights; (4) arrest Day unlawfully; (5) conduct an illegal search and seizure; and (6) prosecute maliciously. In addition, Day claims that he was not timely arraigned, nor was his post-arrest fingerprint cards, photographs, and property seized returned to him. Murray now moves pursuant to Fed. R. Civ. P. 12(f) to strike the Amended Complaint as against him. Additionally, Moscow moves pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

FACTS

On December 11, 1985, Day, with written authorization from the New York City Department of Correction ("DOC"), accompanied an attorney to the 9th floor at a New York State Courthouse located at 111 Centre Street in the borough of Manhattan. Amended Complaint paragraphs 18-19. They were "delivering a message to a prisoner, a Black man, regarding legal counsel ... ." Amended Complaint paragraph 18. Almost twenty four hours later, Day returned to that same courtroom "taking notes on the arraignment of the aforesaid prisoner, a Black person, at which [sic] Defendant MOSCOW was the prosecutor." Amended Complaint paragraph 20.

While observing and waiting in the gallery of the courtroom, Day was arrested. The arrest, apparently

undertaken by Murray on Moscow's direction, was warrantless and not in response to a misdemeanor complaint. Following the arrest, Murray searched a briefcase and billfold in Day's possession. Amended Complaint paragraph 22. After various papers were removed from Day's briefcase, Moscow allegedly instructed Murray to swear out a complaint for Criminal Trespass in the Third Degree. Amended Complaint paragraphs 26, 37.

Day was then handcuffed and removed to the Fifth Precinct. At the precinct house, Day was allegedly given a desk "appearance ticket," released and told to return at a future time. Amended Complaint paragraph 23. Instead, Dayu alleges that he was held at Central Booking, photographed, and twice fingerprinted. Amended Complaint paragraphs 24, 25. Moscow then swore out a criminal complaint against Day,

initiating a case for Criminal Trespass in the Third Degree. Amended Complaint paragraph 26. On December 13, 1985, thirty one hours after Day's arrest, he was arraigned and bail was set,[1] Amended Complaint paragraph 28. The prosecution against Day was dismissed on May 14, 1986. Amended Complaint paragraph 36. After prosecution was terminated, Day demanded that his photographs and fingerprints be returned to him. Amended Complaint paragraph 41.

DISCUSSION

Murray maintains that an amended complaint was filed against him in an attempt to have a second bit at the apple, despite the Second Circuit's opinion of

1 Day asserts that his rights were violated when he was not timely arraigned. However, failure to arraign a defendant within 72 hours does not state a federal cause of action for a fourth amendment violation.

rehearing. Thus, Murray claims entitlement to an order striking the amended complaint as against him. I agree, he is so entitled to have the amended complaint stricken. In moving to dismiss the original complaint, Murray alleged that it failed to state a claim upon which relief may be granted and that in any event it was barred by the applicable three year statute of limitations. See Owens v. Okure, 488 U.S. 235 (1989) (three year statute of limitations applies as to false arrest claims as prescribed by New York law.) I held that the complaint alleged only two claims against Murray -- false arrest and unlawful search and seizure -- and that Day failed to state sufficient elements for any cognizable Section 1983 claims.

On appeal, the Second Circuit agreed that those were the only two claims as

against Murray, and on rehearing the court determined that the false arrest and search and seizure claims were time-barred as against Murray. Affirming my dismissal of the complaint against Murray, the court stated: "The petition is granted and we now affirm the dismissal of the complaint against Murray on the ground that the claims pleaded therein are time barred .... [i]t follows that leave to replead the claims asserted against Murray also must be denied." In light of the Second Circuit's mandate denying the plaintiff leave to amend. Day has not succeeded in convincing me that he has pleaded any non-time-barred cognizable claims sufficient to withstand Murray's motion to strike.

Claims brought against Assistant District Attorney Moscow for false arrest and illegal search and seizure were deemed viable and the Second Circuit has allowed

Day to replead only those claims. The implication being that Moscow acted outside his prosecutorial function, choosing to involve himself in extra-judicial, law-enforcement activities. However, Day's first complaint, which asserted claims for malicious prosecution, was dismissed outright by me and later unequivocally affirmed. See Day v. Morgenthau, 909 F.2d 75, 77 (2d Cir. 1990). ("While there are no 'bright lines between quasi-judicial absolutely immune conduct, on the one hand, and investigative and administrative qualified immune behavior on the other,' Powers v. Coe, 728 F.2d 97, 104 (2d Cir. 1984), the allegations that Moscow engaged in malicious prosecution of the charge against Day is clearly within the 'judicial phase of the criminal process,' Imbler, 424 U.S. at 430, and we therefore affirm [its] dismissal.") The Second

Circuit allowed Day to amplify only the two surviving claims by amended complaint. Thus, any claims arising from allegedly malicious prosecution, or conspiracy to do the same, must be rejected outright.

The Second Circuit was clear in limiting Day's amended complaint to "amplifying" only those claims for false arrest and illegal search and seizure. Day, however, "amplifies" his pleading by reasserting claims for inter alia, malicious prosecution. By asserting that a conspiracy arising out of the false arrest and illegal search, he attempts to revive the false arrest and illegal search, he attempts to revive the malicious prosecution claim. Alleging a conspiracy at this juncture does not serve to resurrect dead claims. I further disagree with Day's assertion that any matters left open by the Second Circuit's

mandate are thus fair ground and appropriate to explored in an amended complaint. This remand does not give Day the unfettered right to file a wholly new complaint reasserting claims already dismissed on appeal, in the name of amplifying the very narrow claims which survive. All claims that do not constitute or arise from the alleged unlawful arrest or the search and seizure are improper and cannot withstand this motion for dismiss. Likewise, all claims asserted against persons other than Moscow also must fall.

Regarding Day's claims for unlawful arrest and search, Moscow asserts that these claims are time barred. Day averts that on December 12, 1985, Moscow ordered Murray to arrest Day without a warrant or probable cause. Amended Complaint paragraph 4. Furthermore Day, asserts

that Moscow "instructed Defendant Murray ... to search [his] briefcase and billfold, from which various papers were removed under Moscow's supervision without [a] warrant or probable cause to believe that such contained evidence with regard to the charge alleged." Amended Complaint paragraph 22. Moscow maintains that these false arrest and illegal search claims are time barred in that the action was commenced one day beyond the three year statute of limitations. See Day v. Morgenthau, 909 F.2d 75, 78 (2d Cir. 1990); Owens v. Okure, 488 U.S. 235 (1989).

As the Second Circuit concluded on rehearing, Day's challenge to Murray's arrest and search of him was untimely. If untimely as to Murray, it necessarily follows that these claims were untimely as to Moscow. The accrual date was December

12, 1985, the date that the "decisive events," namely the arrest and search, occurred and the date on which Day gained knowledge of the wrong. This is so especially in light of the allegation that Moscow called for and authorized Day's arrest on December 12, 1990. See Singleton v. New York, 632 F.2d 185, 191 (2d Cir. 1980), cert. denied, 450 U.S. 920 (1981) (federal law which governs the date of accrual of federal claims such as those asserted under 42 U.S.C. Sections 1983 and 1985(2), "'establishes as the time of accrual that point in time when he plaintiff knows or has reason to know of the injury which is the basis of his action.'") (quoting Bireline v. Seagondollar, 567 F.2d 260, 263 (4th Cir. 1977). As determined on rehearing, in order for Day to have met the three year statute of limitations, the complaint had to have been filed on December 12, 1988.

It was not.

Day, however, asserts that certain events tolled the accrual of the statute. Specifically, he contends that the unlawful arrest and search claims are not time-barred because: (1) Moscow waived his affirmative defense of statute of limitations; (2) his actions were part of a conspiracy and the statute accrued at the time of the last over act in furtherance thereof; (3) his actions are part of a continuing violation of Day's first amendment rights; (4) Day was under duress, thus tolling the statute; and (5) Moscow should be estopped from raising the limitations defense by virtue of New York's General Municipal Law Section 50 (McKinney 1986).

Day's assertion that Moscow waived the statute of limitations defense with

respect to unlawful arrest, search and seizure claims (because it was not asserted in his first pre-answer motion to dismiss the first complaint) is without merit. The statute of limitations defense need not be raised in a pre-answer motion. Santos v. District Council of New York City and Vicinity of United Brotherhood of Carpenters and Joiners, 619 F.2d 963, 967 (2d Cir., 1980). Moreover, it is incongruous to deny Moscow the chance to raise a viable defense when Day is afforded the opportunity amend his complaint, thus getting a second bite at the apple. There was neither excessive delay on Moscow's part in raising the defense, nor substantial prejudice suffered by Day thereby. That Day may lose the motion does not constitute prejudice. Indeed, had Day sought to bring analogous claims of false arrest and unlawful search in a New York State Court,

the claims would have been time barred under the state's lesser one year statute of limitations. See N.Y. Civ. Prac. L. R. Section 215(3) (McKinney 1990).

Similarly, any contention that the complaint is not time barred because Day is the victim of a purported comprehensive conspiracy is frivolous and must be rejected out of hand. There is nothing in the pleadings to suggest surreptitious or covert actions by Moscow after Dayu's arrest that would justify tolling the statute. The complaint wholly fails to plead adequate, non-illusory allegations to make out a conspiracy claim. Indeed, allegations of conspiracy are newly raised in the amended complaint apparently in order disguise that the case is otherwise clearly time-barred. Under the circumstances, allegations of conspiracy are inadequate to initiate a toll of the

statute of limitations sufficient to withstand motions to dismiss. Likewise, any claims for false arrest and unlawful search and seizure bootstrapped to the purported conspiracy must fall as well.

Moreover, merely alleging a series of interlocking violative events is not enough to constitute a conspiracy sufficient to postpone accrual of claims. Singleton v. New York, 632 F.2d 185, 192 (2d Cir. 1980), cert. denied, 450 U.S. 920 (1981) ("crucial time for accrual purposes is when the plaintiff becomes aware that he is suffering from a wrong for which damages may be recovered in a civil action"). The operative date for accrual of Day's claims is December 12, 1985, the day that he was arrested. Day failed to file suit within three years from that date. None of the post-arrest events elevate Day's claims to a

conspiracy. Although Day alleges subsequent "interlocking" violative events, no viable conspiracy can be gleaned therefrom.

Day, however, attempts to circumvent the rule, as delineated in Singleton, by asserting the "continuing violation" doctrine. This doctrine is usually employed in connection with employment discrimination suits and functions to toll the time to file an action "[w]here the defendant has engaged in a continuous policy of discrimination." Association Against Discrimination in Employment, Inc. v. Bridgeport, 647 F.2d 256, 274 (2d Cir.) cert. denied, 455 U.S. 256 (1981). In order to show a continuing violation, plaintiff must show "a series of related acts, one or more of which falls within the limitations period." La Beach v. Nestle Co., 658 F. Supp. 676, 687

(S.D.N.Y. 1987). Day has wholly failed to allege facts sufficient to give rise to a reasonable inference of a continuous "policy of discrimination."

Specifically, Day claims that the unlawful prosecution against his squelched his first amendment rights, hindering him from lawfully conversing with and helping a black prisoner. At the outset, a case involving false arrest/unlawful search charges do not present a situation where the continuing violation doctrine appears applicable or appropriate. Even if Day, as he avers, was unlawfully arrested and prosecuted, thereby chilling his first amendment rights, this is insufficient to warrant application of the doctrine. The continuing violation doctrine may not be based on the continuing effects of earlier unlawful conduct. Delaware State College v. Ricks, 449 U.S. 250, 257 (1980). As

such, Day's use of this doctrine is no more than a ploy to resurrect his time-barred claims. Furthermore, any reliance on duress in order to affect a toll of the statute is misplaced. Any purported duress experienced by Day did not alter the limitations period here. See Cullen v. Margiotta, 811 F.2d 698, 722 (2d Cir.), cert. denied, 483 U.S. 1021 (1987) (only where duress is "part" of the cause of actio itself, or an element thereof, does it have any possible tolling impact.)

Day next asserts that Moscow "is equitably estopped from raising the defense of statute of limitations in virtue [sic] of another tolling provision of New York State law." Plaintiff's Memorandum at 37. Apparently, Day is suggesting that New York's General Municipal Law constitutes a tolling provision. It does not. Section 50-i is

no more than a condition precedent that must be met, regarding the filing of a notice of claim before commencing an action against a municipality. Rapf v. Suffolk County of New York, 755 F.2d 282, 288 (2d Cir. 1985) (discussing Gen. Munic. L. Sections 50-3 and 50-i).

Finally, Day's amended complaint raises an additional two claims pursuant to 42 U.S.C. Sections 1985(2), which were never asserted in his first complaint. The first Section 1985(2) claim asserts that Moscow and Murray "both or either of them conspired with others" to deter Day "by force, intimidation and threat" from attending a federal proceeding and testifying in The Law Firm of Daniel P. Foster, P.c. et al. v. John Does 1-200, et al., 84 Civ. 1337 (CES). Amended Complaint Paragraphs 9, 15. The second section 1985(2) claim asserts that during

the same time period Moscow "conspired with others for the purpose of impeding, hindering, obstructing or defeating the due course of justice in the State of New York" as a result of being "arrested and prosecuted because [Day] assisted a Black prisoner with his equal right to counsel." Amended Complaint paragraph 10; Plaintiff's Memorandum at 8.

Although the amended complaint fails to set forth with any reasonable certainty facts showing what Moscow did to carry the conspiracy into effect, Day apparently ties the purported misconduct to his own criminal prosecution. Indeed, these claims cannot fairly be viewed as a foreseeable outgrowth of the original complaint. Additionally, Day concedes that the prosecution ended on May 14, 1986. Thus, if Day was intimidated as a result of that prosecution from testifying

in federal court or from assisting a Black prisoner in a separate state prosecution, any intimidation clearly ended after Dayu's prosecution was dismissed on May 14, 1986. Accordingly, Day had three years to amend the original complaint incorporating his Section 1985(2) claims. Since these claims were not part of the original complaint, and raised for the first time on November 15, 1990 in the amended complaint, both Section 1985(2) claims are time barred under the applicable statute of limitations period. Indeed, all claims asserted in the amended complaint apparently arise from the same basic events, dating from the arrest and search, thus all other claims, in addition to those appended to the Section 1983 and 1985(2) must fall as well.

For the foregoing reasons, motions to strike and dismiss brought by defendants Murray and Moscow are granted in whole and Day's amended complaint is dismissed in its entirety as against all defendants. This decision close this case and hopefully will write "FINIS" to the entire matter.

SO ORDERED.

DATED: New York, New York
May 14, 1991

KEVIN THOMAS DUFFY, U.S.D.J.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 539—August Term, 1991

(Argued: November 21, 1991 Decided: January 24, 1992)

Docket No. 91-7536

CHRISTOPHER C. DAY, PH.D.,

Plaintiff-Appellant,

—v.—

JOHN W. MOSCOW and JOSEPH B. MURRAY, individually and as Senior Court Officer of the State of New York, JANE DOE MARSHALL, individually and as Captain of the New York City Department of Correction and JOHN DOE, 1-10, unknown named officers of the New York City Police Department and the New York City Department of Correction,

Defendants-Appellees.

Before:

OAKES, *Chief Judge,*
and MESKILL and KEARSE, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York, Kevin Thomas Duffy, *Judge*, dismissing amended complaint brought under 42 U.S.C. §§ 1983 and 1985(2) as barred by prior proceedings and by the statute of limitations.

Affirmed.

BERNARD FROMARTZ, Brooklyn, New York, *for Plaintiff-Appellant.*

THOMAS B. LITSKY, Assistant District Attorney, New York County, New York, New York (Robert M. Morgenthau, District Attorney, New York County, Marc Frazier Scholl, Assistant District Attorney, New York, New York, on the brief), *for Defendant-Appellee John W. Moscow.*

STEPHEN MENDELSOHN, Assistant Attorney General of the State of New York, New York, New York (Robert Abrams, Attorney General of the State of New York, New York, New York, on the brief), *for Defendant-Appellee Joseph B. Murray.*

KEARSE, *Circuit Judge*:

Plaintiff Christopher C. Day appeals from a final judgment of the United States District Court for the Southern District of New York, Kevin Thomas Duffy, *Judge*, entered after proceedings on remand from our prior deci-

sion, *Day v. Morgenthau*, 909 F.2d 75 (2d Cir. 1990) ("*Day I*"), dismissing his post-remand amended complaint brought under 42 U.S.C. §§ 1983 and 1985(2) (1988) for damages in connection with claims of, *inter alia*, false arrest, unlawful search and seizure, malicious prosecution, and conspiracy. The district court dismissed the complaint pursuant to Fed. R. Civ. P. 12(b)(6) and 12(f) on the grounds that the claims asserted were barred by *Day I* and/or by the 3-year statute of limitations. On appeal, Day contends principally (1) that his new claims were not foreclosed by the prior proceedings, and (2) that the statute of limitations had been tolled. For the reasons below, we reject these contentions and affirm the judgment of dismissal.

I. BACKGROUND

The events leading to this litigation, as alleged in the complaint and reiterated in the amended complaint, are set forth in *Day I*, familiarity with which is assumed, and will be but briefly summarized here. At the pertinent times, Day was serving as a paralegal for a New York City law firm. Defendant John W. Moscow was an Assistant District Attorney for New York County; defendant Joseph B. Murray was a senior court officer in the criminal courts building ("courthouse") at 111 Centre Street in New York County.

On December 11, 1985, Day accompanied one of the firm's attorneys to an area of the courthouse known as the "holding pens," in which prisoners were detained. Day waited outside the holding pens while the attorney went inside to deliver a message to a prisoner. On the following day, December 12, 1985, while sitting in a courtroom in the same courthouse, Day was arrested, without a war-

rant, and charged with criminal trespass in connection with his presence outside the holding pens the day before. Murray arrested Day on the instruction of Moscow, and searched Day's briefcase and billfold. Day was incarcerated for some 31 hours while awaiting his arraignment. The charge against him was eventually dismissed.

A. *The Dismissal of the Complaint and the Decision in Day I*

On December 13, 1988, Day commenced the present action against Moscow, Murray, "Jane Doe" Marshall, and several other defendants under § 1983, seeking $500,000 in compensatory damages and $1 million in punitive damages. Day asserted various claims, including claims against Moscow and Murray for false arrest and unlawful search and seizure (sometimes referred here to as the "arrest/search" claims), and against Moscow for malicious prosecution as well. All defendants moved to dismiss the complaint pursuant to Rule 12(b)(6). Moscow argued that he was entitled to prosecutorial immunity; Murray argued that the complaint failed to state a claim against him and that, in any event, the claims asserted against him were barred by the statute of limitations.

In a Memorandum and Order dated October 23, 1989, the district court dismissed the complaint in its entirety. To the extent pertinent here, the court dismissed the claims asserted against Moscow on the ground that his actions were within the scope of his prosecutorial duties and that he therefore enjoyed absolute immunity from Day's claims. The court dismissed the complaint against Murray on the ground that it failed to state a claim against him on which relief could be granted. Day moved for leave to file an amended complaint elaborating on his

claims against Moscow and Murray. The district court denied the motion, and Day appealed.

In *Day I*, this Court vacated the dismissal of the arrest/search claims against Moscow, remanding for the filing of an amended complaint containing those claims, and in all other respects we affirmed the judgment. Since Day did not present any argument as to the dismissals of the defendants other than Moscow and Murray, we discussed only the claims against those two defendants.

With respect to Murray, who argued that the complaint failed to state a claim against him and, alternatively, that the statute of limitations had run, we affirmed the dismissal on the latter ground. Ruling that the three-year limitations period provided by N.Y. Civ. Prac. L. & R. ("CPLR") § 214(5) (McKinney 1990), governed the action, and ruling on reargument that the action had been commenced three years and one day after the claims' accrual, we concluded that the action against Murray was time-barred. With respect to the claims against Murray, we also affirmed the district court's denial of leave to amend. *Day I*, 909 F.2d at 79.

With respect to Moscow, we agreed with the district court that Moscow enjoyed absolute immunity from the claim of malicious prosecution. We ruled that the arrest/search claims, however, alleged acts that are not normally considered prosecutorial functions. As to those claims, therefore, Moscow could claim only qualified, not absolute, immunity. Since his entitlement to qualified immunity could not be determined from the face of Day's complaint, we vacated the dismissal of the arrest/search claims. We remanded and directed the district court "to permit Day to file an amended complaint amplifying those claims." *Id.* at 78.

B. *The Proceedings on Remand*

On remand, Day filed an amended complaint that not only amplified his arrest/search claims against Moscow but also repleaded other claims that had been dismissed and asserted new claims under § 1983 and under 42 U.S.C. § 1985(2) against Murray, Moscow, and "Jane Doe" Marshall, and against 10 "John Doe" defendants who had not been named in the original complaint. The amended complaint, demanding $1 million in compensatory damages and $3 million in punitive damages, asserted, *inter alia*, claims against Murray and Moscow for false arrest, search and seizure, malicious prosecution, unlawful delay of Day's arraignment, and conspiracy to prevent Day from testifying in a court proceeding.

Murray moved pursuant to Rule 12(f) to strike the amended complaint as to him on the ground that the dismissal of the original complaint against him, without leave to replead, had been affirmed on appeal. Moscow moved pursuant to Rule 12(b)(6) to dismiss most of the claims against himself on similar grounds, *i.e.*, that all claims other than the arrest/search claims had been dismissed without leave to replead, that the dismissal had been affirmed on appeal, and that this Court had ordered that Day be allowed to file an amended complaint only with respect to the arrest/search claims. He moved to dismiss the arrest/search claims on the ground that they were barred by the statute of limitations.

In a Memorandum and Order dated May 14, 1991 ("May 1991 Order"), the district court granted Murray's motion to strike the amended complaint as against him. Noting that this Court had affirmed the dismissal of the original complaint as against Murray on the ground that the claims were barred by the statute of limitations, the

district court concluded that the claims Day attempted to assert against Murray in the amended complaint were likewise barred.

As to Moscow, the district court concluded that this Court's remand to permit Day to replead had been limited to the arrest/search claims and that Day's new claims were thus improperly asserted. As to the arrest/search claims, the court concluded that they were barred by the statute of limitations. The district court noted that this Court had found those claims untimely as to Murray, and it concluded that, "[i]f untimely as to Murray, it necessarily follows that these claims were untimely as to Moscow." *Id.* at 9. Though Day contended that the statute of limitations had been tolled for a number of reasons, the court rejected all of his arguments.

As to the "John Doe" defendants, the district court ruled that this Court's limited grant of leave to replead against Moscow did not allow Day to bring in new parties, and it apparently concluded that the claims against these parties, which arose from the same series of events, were barred by the statute of limitations.

Accordingly, the court dismissed the amended complaint in its entirety. This appeal followed.

II. DISCUSSION

On appeal, Day argues principally (1) that the mandate in *Day I* did not foreclose his assertion of any claims, and (2) that his arrest/search claims against Moscow are not time-barred because the running of the statute of limitations had been tolled. For the reasons below, we conclude that most of Day's new claims were foreclosed by *Day I*, that the statute of limitations on Day's arrest/search

claims against Moscow was not tolled, and that the complaint was therefore properly dismissed.

A. *Day's Claims Against Defendants Other Than Moscow*

Day's challenges to the district court's dismissal of the amended complaint's claims against defendants other than Moscow do not require lengthy discussion. Most of those claims are foreclosed by our decision in *Day I*.

1. *Murray*

As against Murray, the original complaint asserted only claims of false arrest and unlawful search and seizure. The district court dismissed the complaint against him and denied Day's request for permission to file an amended complaint. This Court affirmed the dismissal and affirmed the denial of leave to replead against Murray. Accordingly, *Day I* confirmed the entry of a final judgment in Murray's favor.

Principles of res judicata bar Day's attempt to relitigate not only the arrest/search claims that had already been asserted against Murray, the dismissal of which became final in *Day I*, but also any other claim that Day could have asserted against him arising out of the same series of events. *See, e.g., Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948); *Balderman v. United States Veterans Administration*, 870 F.2d 57, 62 (2d Cir. 1989); *Tucker v. Arthur Andersen & Co.*, 646 F.2d 721, 727 (2d Cir. 1981); Restatement (Second) of Judgments § 24 (1982). Generally res judicata is an affirmative defense to be pleaded in the defendant's answer. *See* Fed. R. Civ. P. 8(c). However, when all relevant facts are shown by the court's own records, of which the court takes notice, the defense may

be upheld on a Rule 12(b)(6) motion without requiring an answer. *See, e.g., W.E. Hedger Transp. Corp. v. Ira S. Bushey & Sons*, 186 F.2d 236, 237 (2d Cir. 1951). Thus, though Rule 12(f), which permits the court to strike from a pleading any matter that constitutes an "insufficient defense" or that is "redundant, immaterial, impertinent, or scandalous," Fed. R. Civ. P. 12(f), was not the appropriate procedural vehicle for Murray's motion, *see* 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1380, at 644 (1990) (Rule 12(f) designed for excision of material from a pleading, not for dismissal of claims in their entirety), dismissal of the amended complaint against Murray was plainly proper.

2. *"Jane Doe" Marshall*

The original complaint asserted claims against several individuals other than Murray and Moscow. All such claims were dismissed, and, as stated above, the claims against those other defendants were not pursued on Day's first appeal. Consequently, the dismissals as to defendants other than Murray and Moscow were not disturbed in *Day I* and became final as to them. Thus, as to those defendants, as with respect to Murray, principles of res judicata foreclosed any further assertion by Day of claims with respect to the events described in the original complaint.

In his amended complaint, Day attempted to assert such claims against "Jane Doe" Marshall. Since "Jane Doe" Marshall was an original defendant as to whom the judgment dismissing the complaint had become final, the district court properly dismissed the amended complaint against her since those claims are barred by res judicata.

3. *The "John Doe" Defendants*

Day's amended complaint also brought in ten new defendants, denominated "John Doe[s] 1-10" and described as officers of the New York City Police Department or Department of Correction. The arrest of Day at the courthouse on December 12, 1985, and the ensuing treatment of him were alleged to be the result of a conspiracy in which the "John Doe[s]" were alleged to have participated.

The district court apparently dismissed these claims on the ground that our limited remand permitting amendment of two claims against Moscow foreclosed the introduction of claims against any new defendants and that such claims were barred by the statute of limitations. Day has not explicitly challenged the dismissal of the "John Doe[s]" on this appeal, but we note that to the extent that his request for relief envisions reinstatement of his claims against these parties, it lacks merit. Though our prior decision did not purport to foreclose the commencement of a new action against any persons other than those who were then parties to the action, it established that the three-year statute of limitations provided in CPLR § 214(5) governs Day's claims, *Day I*, 909 F.2d at 78-79. Dismissal of the asserted claims against the new defendants thus was correct on statute of limitations grounds.

B. *The Claims Against Moscow*

The claims asserted by Day in the amended complaint against Moscow may be divided into two groups: his arrest/search claims, all other claims. Assertion of the latter group was barred by *Day I*; assertion of the arrest/search claims was barred by the statute of limitations. We discuss them in reverse order.

spirator of Moscow, or (3) because CPLR § 204(a) (McKinney 1990) provides for tolling in connection with Day's filing of a notice of claim under New York's municipal administrative claim procedure. We note that these issues were not addressed by this Court in *Day I* because in response to Murray's statute-of-limitations argument (Moscow had not then asserted such a defense), Day made no argument as to tolling. Though it is well established that when a federal court looks to state law to determine the appropriate statute of limitations governing a claim brought under § 1983, it must also refer to the state's coordinate tolling rules unless they are inconsistent with federal law, *Board of Regents v. Tomanio*, 446 U.S. 478, 484-86 (1980), we conclude that none of Day's present contentions has merit, and only the third requires extended discussion.

We reject Day's first contention, *i.e.*, that the statute of limitations was tolled by duress, because under New York law duress will toll the running of a statute of limitations only if duress against the plaintiff is an element of the cause of action asserted. *See, e.g., Cullen v. Margiotta*, 811 F.2d 698, 722 (2d Cir.), *cert. denied*, 483 U.S. 1021 (1987); *Baratta v. Kozlowski*, 94 A.D.2d 454, 458-59, 464 N.Y.S.2d 803, 806 (2d Dep't 1983). Duress is not an element of a cause of action for false arrest, *see generally Broughton v. New York*, 37 N.Y.2d 451, 456-57, 373 N.Y.S.2d 87, 93-94, *cert. denied*, 423 U.S. 929 (1975), or a claim of unlawful search and seizure. We reject Day's second contention, *i.e.*, that the statute was tolled by timely service of process on a coconspirator, because, *inter alia*, the original complaint did not allege a conspiracy, *Day I* did not permit Day to introduce a conspiracy claim, and in any event, as the district court aptly

1. *The Claims of Malicious Prosecution, Conspiracy, etc.*

Where issues have been "explicitly or implicitly decided on appeal," *United States v. Uccio*, 940 F.2d 753, 758 (2d Cir. 1991), the law-of-the-case doctrine obliges the district court on remand to follow the decision of the court of appeals, *see, e.g., id.* at 757; *Soto-Lopez v. New York City Civil Service Commission*, 840 F.2d 162, 167 (2d Cir. 1988); *United States v. Fernandez*, 506 F.2d 1200, 1202 (2d Cir. 1974); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4478, at 792-93 (1981). In *Day I*, we explicitly affirmed the dismissal of the claim against Moscow for malicious prosecution on the ground of absolute immunity. The dismissal of that claim thus was final. Further, since in vacating the dismissal of the arrest/search claims we stated that Day should be allowed to "file an amended complaint amplifying *those* claims," *Day I*, 909 F.2d at 78 (emphasis added), we implicitly, if not explicitly, ruled that any amended complaint was to be limited to those claims.

Accordingly, the district court properly ruled that the amended complaint, insofar as it sought to assert against Moscow claims other than claims for false arrest and unlawful search and seizure, was foreclosed by *Day I*.

2. *The Arrest/Search Claims Against Moscow*

The remaining question is whether the arrest/search claims against Moscow were properly dismissed on statute-of-limitations grounds. Day contends that the district court should have ruled his claims against Moscow timely on the ground that the statute of limitations was tolled either (1) because Day was under duress, or (2) because he timely served process on an alleged cocon-

found, Day's present allegation "of a purported comprehensive conspiracy is frivolous." May 1991 Order at 10.

Day's final contention, *i.e.*, that the statute of limitations was tolled by CPLR § 204(a), has some superficial appeal but ultimately does not withstand analysis. The foundation for this argument is the interplay between CPLR § 204(a) and the state administrative provisions affecting claims against municipalities.

When the alleged events occurred, New York law provided that a suit against a municipality or its employees must be preceded by the filing of a notice of claim with the municipality. *See* N.Y. Gen. Mun. Law § 50-e (McKinney 1986 & Supp. 1991); *but see Felder v. Casey*, 487 U.S. 131 (1988) (ruling that states may not establish such a notice of claim as a precondition to suit in state court under § 1983). The New York statutory scheme also provided that whenever a notice of claim was filed, the municipality had the right to demand an examination of the claimant, and that "[w]here [such] a demand has been served . . . no action shall be commenced against the [municipality] unless the claimant has duly complied with such demand for examination." N.Y. Gen. Mun. Law § 50-h(5) (McKinney 1986 & Supp. 1991).

CPLR § 204(a) provides that "[w]here the commencement of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced." Under New York law, the prohibition found in § 50-h(5), forbidding commencement of an action until the demand for an examination has been honored, triggers § 204(a)'s tolling provision. *See Hauptman v. New York City Health and Hospitals Corporation*, 162 A.D.2d 588, 589, 556 N.Y.S.2d 929 (2d Dep't 1990).

In his amended complaint, Day alleged that "[o]n November 3, 1986, the Office of the Comptroller served a Demand for Plaintiff's examination, which was held on June 8, 1987." (Amended Complaint ¶ 2.) Thus, he argues that from November 3, 1986, to June 8, 1987, § 50-h(5) prevented him from commencing his suit and that CPLR § 204(a) tolled the statute of limitations for that seven-month and five-day period. When this additional time is added to the limitations period, Day's arrest/search claims were timely filed.

The flaw in this argument is that, though New York's notice-of-claim requirements were, prior to *Felder v. Casey*, 487 U.S. 131, applicable to § 1983 suits brought in state court, they were not applicable to § 1983 suits brought in federal court. *See, e.g., Brandon v. Board of Education*, 635 F.2d 971, 973 n.2 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981); *Courtemanche v. Enlarged City School District*, 686 F. Supp. 1025, 1032 (S.D.N.Y. 1988); *Burroughs v. Holiday Inn*, 621 F. Supp. 351, 353-55 (W.D.N.Y. 1985); *Williams v. Allen*, 616 F. Supp. 653, 656-59 (E.D.N.Y. 1985); *Paschall v. Mayone*, 454 F. Supp. 1289, 1298 (S.D.N.Y. 1978). Thus, *Felder v. Casey* noted that although the Supreme Court itself "ha[d] never passed on the question, the lower federal courts have all, with but one exception, concluded that notice-of-claim provisions are inapplicable to § 1983 actions brought in federal court." 487 U.S. at 140. The lone exception referred to in *Felder* was *Cardo v. Lakeland Central School District*, 592 F. Supp. 765, 772-73 (S.D.N.Y. 1984), which was not authoritative, since it was contrary to the principle stated by this Court in *Brandon v. Board of Education*, 635 F.2d at 973 n.2, upholding a ruling that compliance with the state's notice-of claim provision was not a precondition to the district court action. Since the

filing of a notice of claim was not a prerequisite to the federal-court suit, a municipality perforce could not require a delay of the commencement of a federal-court suit pending an examination based on such a notice. Thus, there was no point during the three-year period provided by CPLR § 214(5) at which Day was barred from commencing the present suit in federal court. Since there was no statutory prohibition against a suit such as the present one in federal court, we conclude that under state law, the tolling provision in § 204(a) would not be deemed applicable to an action in federal court.

A statute of limitations is a statute of repose, "considered indispensable to any scheme of justice." *Felder v. Casey*, 487 U.S. at 140. The purpose of a tolling provision is to assure that the claimant has the full period of time provided by a statute of limitations in which to bring his suit. In the present case, no valid purpose would be served by enlarging the prescribed period to "compensate" for a disability that did not exist.

CONCLUSION

We have considered all of Day's arguments on this appeal and have found them to be without merit. The judgment dismissing the amended complaint is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the day of
on thousand nine hundred and

Present:

Hon. J.L. OAKES

Hon. T.J. MESKILL

Hon. A.L. KEARSE

CIRCUIT JUDGES

CHRISTOPHER C. DAY, Ph.D.,

Plaintiff-Appellant,

Document No.

91-7536

v.

JOHN W. MOSCOW and JOSEPH B. MURRAY, Individually and as Senior Court Officer of the State of New York, JANE DOE MARSHALL, Individually and as Captain of the New York City Department of Correction and JOHN DOE 1-10, Unknown named Officers of the New York City Police Department and the New York

City Department of Correction.

Defendants-Appellees.

A petition for rehearing, having been filed herein by Plaintiff-Appellant, Christopher C. Day, Ph.D.

Upon consideration, thereof, it is

Ordered that said petition be and it hereby is DENIED.

SO ORDERED:

FOR THE COURT,

Elaine B. Goldsmith, Clerk
By: Kathy Brouwer, Operations Mgr.
Date: 2-25-92

APPENDIX: A.

STATUTES INVOLVED

42 United States Code Section 1988 provides in pertinent part:

Proceedings in Vindication of Civil Rights

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS", and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against the law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in

the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. [...]

(2)

No. 91-1899

Supreme Court, U.S.
FILED
JUN 23 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHRISTOPHER C. DAY, PH.D.,

Petitioner,

—against—

JOHN W. MOSCOW; JOSEPH B. MURRAY, Individually and as Senior Court Officer of the State of New York; "JANE DOE" MARSHALL, Individually and as Captain of the New York City Department of Correction; JOHN DOE, 1-10, Unknown named Officers of the New York City Police Department and the New York City Department of Correction,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MEMORANDUM IN OPPOSITION FOR RESPONDENT MURRAY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

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TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MEMORANDUM IN OPPOSITION FOR RESPONDENT MURRAY

Petitioner seeks plenary consideration of a judgment of the United States Court of Appeals for the Second Circuit which dismissed his claims against respondent Murray. The Court of Appeals held, correctly, that petitioner's claims against respondent Murray are time-barred ("*Day I*") (A.11[1] and A.21 [on

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1 References in the form A.____ are to the appendix to the petition.

rehearing]) and that principles of res judicata bar petitioner's attempt to litigate, as to respondent Murray, new claims that could have been asserted previously ("*Day II*") (A.52).

Petitioner first argues that the Court of Appeals, in ruling that his false arrest claim under 42 U.S.C. § 1983 accrued on December 12, 1985, the day of his arrest, not on December 13, 1985, the day of his arraignment, erred by applying a "general federal rule of accrual" instead of state law. However, as the Court of Appeals noted (A.18-19), this Court has made clear that "[o]nly the length of the limitations period, and closely related questions of tolling and application, are to be governed by state law [footnote omitted]." *Wilson v. Garcia*, 471 U.S. 261, 269 (1985). When petitioner's claims accrued is determined by federal law, and the Court of Appeals rightly held his claims against Murray were time-barred.

Petitioner also argues that *Day I* did not bar him from litigating new claims against respondent Murray because that decision was not final. In *Day I*, however, the Court of Appeals affirmed not only the district court's dismissal of the complaint against respondent Murray, but also the denial of leave to replead against Murray. Thus, *Day I* necessarily precluded all claims that Day could have asserted against Murray arising out of the same series of events, for that decision finally determined that all such claims were time-barred and that Day would not be granted leave to amend the complaint in order to plead such claims.

Therefore, the petition for a writ of certiorari should be denied.

Dated: New York, New York
June 23, 1992

Respectfully submitted,

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No. 91-1899

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OCTOBER TERM, 1991

CHRISTOPHER C. DAY, PH.D.,

Petitioner,

– against –

JOHN W. MOSCOW; JOSEPH B. MURRAY, Individually and as Senior Court Officer of the State of New York; "JANE DOE" MARSHALL, Individually and as Captain of the New York City Department of Correction; JOHN DOE, 1-10, Unknown named Officers of the New York City Police Department and the New York City Department of Correction,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S BRIEF IN REPLY

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13

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

ARGUMENT

I. THE ACCRUAL OF CLAIMS IN 1983 ACTIONS IS PART OF THE STATE'S CONSIDERED LIMITATIONS POLICY AND SHOULD BE APPLIED 2

II. THE COURT OF APPEALS' UNPRECEDENTED EXTENSION OF THE DOCTRINE OF RES JUDICATA BARRED A CLAIM WHICH THE TRADITIONAL RULE WOULD HAVE ALLOWED .. 6

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Amy v. Dubuque, 98 U.S., 8 Otto 474, 25 L. Ed. 228 (1878) 5

Bireline v. Seagondollar, 567 F.2d 260 (4th Cir., 1977) 5

Board of Regents v. Tomanio, 446 U.S. 478, 100 S. Ct. 1890, 64 L. Ed. 2d 440 (1980) 2, 3

Colt v. Christiansen Industries, 486 U.S. 800 (1988) 8

Conway v. Village of Mount Kisco, 750 F.2d 205 (2d Cir., 1984), cert. den., Cerbone v. Conway, 479 U.S. 84 (1986) 6

Cowgill v. Raymark Industries, Inc., 832 F.2d 798 (3d Cir., 1987) 8

Crown Coat Front Co. v. United States, 386 U.S. 503, 87 S. Ct. 1177, 18 L. Ed. 2d 256 (1967) 3, 4

Federal Reserve Bank v. Atlanta Trust Co., 91 F.2d 283 (5th Cir., 1937), cert. den., 352 U.S. 738, 82 L. Ed. 58, S. Ct. 140 4

Johnson v. Railway Express Agency, 421 U.S. 454, 95 S. Ct. 1716, 44 L. Ed. 2d 295 (1975) 2

Reading Co. v. Koon, 271 U.S. 58, 46 S. Ct. 405, 70 L. Ed. 835 (1926) 4

Todd v. S.E.C., Inc., 637 F.2d 154 (3d Cir., 1980) 8

Urie v. Thompson, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949) 6

Wilson v. Garcia, 471 U.S. 261, 105 S. Ct. 1038, 85 L. Ed. 2d 254 (1985) 2, 5

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

91-1899

CHRISTOPHER C. DAY, Ph. D.,

Petitioner

- against -

JOHN W. MOSCOW, et al.,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Christopher C. Day, Ph. D., (DAY) submits the following Brief in support of his Petition for Certiorari to this Court from the judgment of the United States Court of Appeals for the Second Circuit, entered January 24, 1992.

I. THE ACCRUAL OF CLAIMS IN IN 1983 ACTIONS IS PART OF THE STATE'S CONSIDERED LIMITATIONS POLICY AND SHOULD BE APPLIED

This Court is asked in this case to construe the meaning of "accrual" in Section 1983 actions. The Court below applied a unitary general federal rule of accrual.

A natural interpretation would suggest we turn to state law to construe the term, as Section 1988 requires that we borrow state statutes of limitations as well as coordinate tolling rules and rules of application. Wilson v. Garcia, 471 U.S. 261, 105 S. Ct. 1038, 85 L. Ed. 2d 254 (1985). Johnson v. Railway Express Agency, 421 U.S. 454, 95 S. Ct. 1716, 44 L. Ed. 2d 295 (1975), passim, at 463 (see also, Board of Regents v. Tomanio, 446 U. S. 478, 100 S. Ct. 1890, 64 L. Ed. 2d 440

(1980), at 488). The purpose of Section 1988 in so requiring is deference to the state's "wisdom in setting a limit" as part of a "complete limitations policy." Board of Regents, supra, at 488. Instead, the Court below turned to a "federal rule of accrual" for actions generally. (A-40).

The fallacy of this approach is shown by reference to this Court's decisions rejecting just such a unitary approach to the meaning of the term "accrual".

> The Court has pointed out before [...] the hazards inherent in attempting for all purposes when a "cause of action" first "accrues."

Crown Coat Front Co. v. United States, 386 U.S. 503, 517, 87 S. Ct. 1177, 18 L. Ed. 2d 256 (1967).

Previously, in Reading Co. v. Koons, this Court had affirmatively stated:

> We do not think it possible to assign to the word "accrue" any

> definite technical meaning which by itself would enable us to say whether the statutory period begins to run at one time or another.

Id, 271 U.S. 58, 61-62, 46 S. Ct. 405, 70 L. Ed. 835 (1926).

Cases under one statute do not govern cases under another. Compare, Crown Coat Front, at 517. This is especially so, given the nature of Section 1983 claims which are not unitary.

The proper question is, as the Fifth Circuit stated in Federal Reserve Bank v. Atlanta Trust Co., 91 F. 2d 283 (5th Cir., 1937), cert. den., 352 U.S. 738, 82 L. Ed. 58 S. Ct. 140, "in each case, therefore, where limitation is involved, the important, the controlling question is, what is the cause of action?" Id, at 286.

The federal courts have repeatedly turned to state law and borrowed the elements of state tort law to provide content

to the term "cause of action" under Section 1983. See, Wilson v. Garcia, supra, at 277.

This Court has thus, construed "accrual" to mean when the cause of action is "complete." Amy v. Dubuque, 98 U.S., 8 Otto, 470, 474, 25 L. Ed. 228 (1878)

If under Section 1988, federal courts borrow the elements of state law false arrest claims in analogous actions, and the state law of false arrest holds that the cause is not "complete and perfect" until the plaintiff is released, why should the state's scheme and clear intention in determining when such analogous claims begin to run be ignored in favor of a general federal rule, such as that proposed in the cases relied on here? (See, Bireline v. Seagondollar, 567 F. 2d 260, 263 (4th Cir., 1977) borrowing such a "rule" from other areas of federal law

(Urie v. Thompson, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949) (FELA).)

II. THE COURT OF APPEALS' UNPRECEDENTED EXTENSION OF THE DOCTRINE OF RES JUDICATA BARRED A CLAIM WHICH THE TRADITIONAL RULE WOULD HAVE ALLOWED

Respondents' arguments on the second question raised by Petitioner to this Court demonstrates the very reason why this Court should intervene.

Respondents argue that in Day I the Court of appeals "finally determined" that all the claims Petitioner could have asserted against Respondent Murray were "time-barred." However, a Section 1983 malicious prosecution claim would not have been time-barred. See, Conway v. Village of Mount Kisco, 750 F. 2d 205 (2d Cir., 1984), cert. dism. sub nom., Cerbone v. Conway, 479 U.S. 84 (1986).

In its decision in Day I, the Court of Appeals only addressed the timeliness of Plaintiff's "arrest/search claims" (A-22), the only issue raised by Murray, and denied leave to replead those.

Yet, Petitioner had stated a claim for malicious prosecution (A-16), and pled in his proposed amended complaint (Par. 9, 11, 13) (Appellant's Supplemental Appendix in 90-7040, 4-6) that Murray had not observed Petitioner at the place and time he was alleged to have trespassed, and "initiated the prosecution" "in conspiracy" with Respondent Moscow, and argued this to the Court of Appeals (Appellant's Brief, 90-7040, at 18-19).

In this case, Petitioner, a distinguished professor, author, civil rights advocate and court-watcher was arrested at the instance of district attorney, who stole his briefcase, and subjected him to

a six-month trespass prosecution, for simply being in the courthouse.

Applying the law of the case, rather than res judicata to the decision in Day I, reversing in part and affirming in part (see, Todd v. S.E.C., Inc., 637 F. 2d 154 (3d Cir., 1980); Cowgill v. Raymark Industries, Inc., 832 F. 2d 798 (3d Cir., 1987)), such a ruling that "all ... claims [arising from Day's arrest and prosecution] were time-barred" would be subject to revision as "clearly erroneous." Colt v. Christiansen Industries, 486 U.S. 800, 817 (1988), and Petitioner would be entitled to prosecute his malicious prosecution claim against Murray.

CONCLUSION

Therefore the petition for certiorari should be granted.

Dated: July 13, 1991
Brooklyn, New York

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